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No. 96-1871

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

WINFRED L. MAXWELL,

Petitioner,

- against -

WILLIAM BRATTON as Police Commissioner of the New York City Police Department, Police Lieutenant THOMAS KELLY, Police Inspector PHILIP LEE, Police Chief THOMAS GALLAGHER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-QUESTION PRESENTED

Whether the Court of Appeals, consistent with the three-pronged analysis used to assess the reasonableness of a suspicionless police stop, properly found the Special Operation, a temporary checkpoint encompassing an eight square-block area, to be constitutional, where the checkpoint, devised primarily to deter drive-by shootings that had recently plagued the area served an important public concern, the checkpoint was reasonably viewed by respondents as an effective mechanism and it was undisputed that during its six-week operation no drive-by shootings occurred, and the intended level of intrusion to motorists was minimal in that the stop was brief and aimed solely at ascertaining the motorist's connection to the neighborhood?

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner Winfred L. Maxwell ("petitioner"), commenced this action for alleged violations of his civil rights under 42 U.S.C. §§ 1983, 1985(3) and 1986, and for alleged violations of state law, arising from his encounter with officers at a vehicle checkpoint that was implemented to reduce drive-by shootings and other serious crimes in the Soundview

neighborhood of the Bronx (A 22-102).[1] Respondents Police Commissioner William Bratton, Police Lieutenant Thomas Kelly, Police Inspector Philip Lee, and Police Chief Thomas Gallagher, collectively the "respondents," together with the City of New York and The New York City Police Department (collectively, the "municipal defendants"), moved for partial summary judgment on petitioner's first eleven claims pursuant to Fed. R. Civ. P. 56, seeking injunctive and declaratory relief and money damages for the municipal defendants' allegedly unconstitutional acts committed in connection with this checkpoint operation (A 13-102, 110-722). Petitioner also moved for partial summary judgment on his first eleven claims (A 854-948). By Opinion and Order (one paper), dated April 25, 1995, the United States District Court for the Southern District of New York (Mukasey, J.), denied petitioner's cross-motion for summary judgment, granted the municipal defendants' motion for summary judgment to the extent that it dismissed petitioner's first eight claims for injunctive and declaratory relief for lack of standing, dismissed petitioner's Tenth Claim on the ground that the checkpoint did not violate petitioner's constitutional right to intrastate travel, and dismissed petitioner's Eleventh Claim on the ground that the checkpoint did not violate petitioner's First Amendment right of freedom of association (See Appendix annexed to Petition For Writ Of Certiorari ("App."), A-19, 24-27, 30-32). The District Court, however, declined to dismiss petitioner's Ninth Claim seeking money damages for his alleged unlawful seizure at the checkpoint (App. A-27-30).

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[1] Unless otherwise indicated, numbers in parentheses preceded by the letter "A" refer to pages of the Joint Appendix submitted to the Court of Appeals for the Second Circuit.

Thereafter, the municipal defendants filed a notice of appeal taking an appeal "as of right" from the District Court's denial of their motion for summary judgment (A 1167-1169).

Petitioner seeks to have this Court review by way of certiorari an order of the United States Court of Appeals for the Second Circuit, entered December 17, 1996, which, in a two-to-one decision, reversed the District Court's order and granted the respondents' motion for summary judgment based on qualified immunity, having determined that the checkpoint as planned, was constitutional.

STATEMENT OF FACTS

Between May and July of 1992, street crime, including drive-by shootings, escalated in the Soundview neighborhood of the Bronx (App. A-3, 19-20; A 115-116).[2] In response to urging by members of the neighborhood Community Council to stem this ongoing epidemic of drive-by shootings and other serious crimes, the Watson Avenue Special Operation ("the Special Operation"), was developed and approved, wherein temporary street barricades were to be set up to prevent traffic,

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[2] On May 3, 1992, a car drove past the corner of Watson and Ward Avenues in the Soundview section of the Bronx, and passengers armed with automatic weapons opened fire, killing one pedestrian and wounding seven others; on May 27, 1992, police arrested three heavily armed people in a car whom they believed were on their way to commit a drive-by shooting in the same area; less than one month later, a drive-by shooting at the corner of Manor and Watson Avenues claimed the life of one person, and critically injured two others; and on July 18, 1992, drive-by shooters killed another person near Wheeler Avenue (App. A-19-20; A 115-16).

other than from "'area residents and commercial vehicles,' from entering" the eight square-block narcotics-ridden area where most of the drive-by shootings had occurred (App. A-3, 20; A 117-118, 595-600, 631, 635, 639-640, 643). The checkpoint was to be active three days a week on a random basis and for approximately six hours a day, primarily in the evening hours (App. A-3-4; A 118-120). The stated purpose was to reduce drug activity, street robberies, and most importantly, eliminate drive-by shootings (App. A-20-21; A 923-924, 926). It was hoped that by conducting this operation, "'the basis of the relationship between dealer and buyer -- dependability of supply in terms of place and time of availability -- will break down and both will abandon the area'" (App. A-20-21; A 598).

Respondent Lieutenant Kelly testified at his deposition that all vehicles were to be stopped and their drivers asked to show their licenses (App. A-21; A 1095). If the address on the license did not match an address in the barricaded area, the officers manning the barricades had discretion to request other documentary proof to ascertain whether the driver lived in the area (App. A-21; A 1096). Even if a driver failed to provide such proof, the officer had discretion to let the vehicle pass if the driver provided a "reasonable explanation" for traveling into the area, or if the passengers did not fit a profile of a drive-by shooter (App. A-21; A 1097-1107). "Thus, a delivery truck, a car full of children, a vehicle driven by a local store owner, or a car dropping off visitors to the Green Pastures Church might be allowed to pass through the barricade even if the driver lacked adequate documentary proof that he lived in the neighborhood" (App. A-21; A 1099-1107). "Even passengers in a car fitting a description of drive-by shooters might be allowed to pass if the driver said he was visiting a friend in the area, and could provide his friend's

correct address" (App. A-21, A 1110). "Drivers who wished to avoid the police interrogation could drive around the area blocked by the barriers, or park their cars outside the barriers, and proceed on foot" (App. A-21; A 121).

These instructions were alleged to be provided orally to the officers who manned the barricades, but Lieutenant Kelly never put them in writing (App. A-21-22; A 894, 897, 1107). According to the District Court, Police Chief Gallagher, who approved the plan, stated that he knew of no effort to make the officers at the barricades aware of proper procedures (App. A-22; A 687).[3] Sergeant Richard Van Leuven testified at his deposition that it was his understanding that the standard for allowing motorists to pass was "'pretty liberal'" and that where the situation required that a judgment call be made by the officer manning the barricade, it "'just comes down to the officer's preference'" (App. A-22; A 885-888). Officer Morley, who actually manned the barricades, testified that he received oral instructions from his supervisors informing him that he should ask the drivers to identify themselves, to state why they were visiting the neighborhood, and to show a driver's license or other form of identification (App. A-22; A 897-898). Officer Morley said that each officer had discretion to decide what form of identification would be adequate (App. A-22; A 905).

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[3] At his deposition, Police Chief Gallagher actually testified that the officers at the checkpoint were part of a closely supervised detail that reported to the station house where they were given instructions before leaving, but that he himself did not make any efforts to ensure that the Police Department procedure was implemented properly (A 687).

The written procedural instructions provided to the supervisors of the Special Operation, written by Lieutenant Kelly, dated August 24, 1992, instructed the detail supervisors to inform officers manning the barricades that "'area residents will be allowed to pass through the barriers, as well as delivery trucks'" (App. A-22; A 923). The memorandum explained further that a driver who appeared to the officers not to have a "'legitimate reason to enter' should be 'instructed to utilize other routes'" (App. A-22; A 923).

At no time did Lieutenant Kelly, Deputy Chief DeRienzo, Police Chief Gallagher or any other officer consider submitting the plan to the legal department for an opinion on the constitutionality of the operation (App. A-22; A 676, 1094-1095). Police Chief Gallagher did not believe a legal opinion was needed because one "'had been done in the past'" with approval of the Legal Bureau for "'Operation Pressure Point'," an undercover operation designed to curb drug traffic on Manhattan's Lower East Side in the mid-1980's, and because he believed that checkpoints established to combat driving while under the influence of alcohol or other drugs passed constitutional scrutiny (App. A-22; A 676-677).

Lieutenant Kelly testified that he did not believe the operation created a constitutional problem because they had an "'extremely serious condition', all vehicles were stopped,[4] there was a minimal 'level of inconvenience' to drivers, and the operation was to be conducted fewer than 18 hours a week" (App. A-23; A 1094-1095). According to Lieutenant

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[4] Lieutenant Kelly stated at his deposition that because all vehicles were stopped, therefore eliminating the arbitrary stop, he, Inspector Lee and Deputy Inspector DeRienzo believed the plan was constitutional (A 1094).

Kelly, no officers had discretion to search vehicles or "'to conduct actual, physical searches of persons or automobiles if they suspected drugs or guns were present'" (App. A-23; A 121). Their task was limited to "'determine whether passing cars belonged to neighborhood residents and if not to turn [them] away'" (App. A-23; A 121). "Despite the lack of posted signs or other advance notice of the approaching barricades [App. A-23; A 1126-1127], [Lieutenant] Kelly believed the roadblocks were 'clearly visible' and that drivers in the area could 'readily observ[e] that all cars were uniformly stopped'" (App. A-23; A 122-123).[5] "Further, the stops lasted no more than a few minutes, and the checkpoint caused no significant traffic congestion" (App. A-23; A 122).

The Special Operation was in effect for six weeks, between August 26 and October 10, 1992 (A 120). "From August 1 to August 25, 1992, the day before the operation began, an additional drive-by shooting occurred on Watson Avenue between Ward and Boynton Avenues, and other criminal activity continued at the same or lower rates than in previous months (App. A-23; A 573-593). From May through July 1992, there were an average of 27 robbery complaints per month, but only 13 robbery complaints filed from August 1 to August 25, 1992 (App. A-23; A 573-593). The District Court noted, however, that in Lieutenant Kelly's declaration, he alleges that there were 33 robberies in August 1992 (App. A-23; A 123). "Complaints for drug offenses and assaults during August, however, were roughly the same as they had been in July" (App. A-23-24). Detective assignment sheets allegedly show a decline in robberies during the months of September and October 1992 (App. A-24). According to Lieutenant

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[5] According to Lieutenant Kelly, the "road was blocked off with bright blue barricades ..." (A 122).

Kelly, "this alleged 'substantial drop in crime' is 'directly attributable to the Watson Avenue Special Operation'" (App. A-24; A 123). According to the declarations of four Community Council members, the Special Operation "'brought relief' from the drug trade and drive-by shootings" (App. A-24; A 632, 636, 640, 644).

In his Second Amended Complaint, of which only the first 11 claims were the subject of the municipal defendants' summary judgment motion, petitioner, in relevant part, sought injunctive and declaratory relief and money damages for the municipal defendants' allegedly unconstitutional acts committed in connection with the Special Operation (A 22-49). In his first four claims, petitioner seeks to enjoin the use of checkpoints similar to the one at issue, asserting that the continued utilization of such checkpoints would constitute: an unreasonable seizure under the Fourth Amendment, in that, inter alia, "the police officer manning the checkpoint would possess unbridled discretion to deny petitioner entry into the barricaded zone" (A 35-37); an unreasonable public intrusion in that petitioner will be asked questions concerning his purpose for entering the barricaded street (A 38-39); a violation of his right to be free from unreasonable impediments to intrastate travel, such as 1) having to answer intrusive questions of a personal nature, and having to show identification in order to drive onto a public street and 2) the possibility of being denied access to a barricaded public street, "upon a police officer's unbridled and unchecked exercise of discretion" (A 39-40); and a violation of petitioner's right to free association (A 41). In petitioner's fifth through eighth claims, he seeks declaratory judgments that the checkpoint violated petitioner's constitutional rights as described in claims one through four (A 42-44). In petitioner's Ninth Claim he seeks, inter alia, money damages against respondents Kelly,

Gallagher and Lee, and Police Officer Morley, for their alleged violation of his allegedly unconstitutional seizure at the checkpoint, under the Fourth Amendment (A 44-45). In petitioner's tenth and eleventh claims, he seeks money damages for the alleged violation of his right to travel intrastate (A 46-47) and his right of freedom of association (A 47-49).

OPINIONS BELOW

(a)

The District Court Opinion

The District Court denied petitioner's cross-motion for summary judgment, granted the municipal defendants' motion for summary judgment to the extent that it dismissed petitioner's first eight claims for injunctive and declaratory relief for lack of standing, dismissed petitioner's Tenth Claim on the ground that the checkpoint did not violate petitioner's constitutional right to intrastate travel, and dismissed petitioner's Eleventh Claim on the ground that the checkpoint did not violate petitioner's First Amendment right of freedom of association (App. A-19, 24-27, 30-32). The District Court, however, declined to dismiss petitioner's Ninth Claim seeking money damages for his alleged unlawful seizure at the checkpoint (App. A-27-30). The Court determined that because there was a "disparity between [the municipal] defendants' claim that all drivers were instructed that they 'were free to turn away' from the barricades, and [petitioner's] assertion that he was never presented with such an option, but rather was required to produce identification immediately, without explanation," summary judgment as to whether a Fourth Amendment seizure occurred was barred (App. A-28).

The Court further determined that even if a seizure had taken place, there was a material issue of fact as to whether the seizure was reasonable under the Fourth Amendment (App. A-28). In reaching this determination, the District Court applied the three-part balancing test applied in Brown v. Texas, 443 U.S. 47 (1979) and used in Michigan Department of State Police v. Sitz, 496 U.S. 444, 450-54 (1990) (App. A-28-29). According to the Court, "[t]he balancing test involves consideration of the gravity of the drive-by shootings, drug sales, and other crimes alleged to require the checkpoint, the effectiveness of the checkpoint in curtailing these crimes, and the level of intrusion on a driver's privacy caused by the checkpoint" (App. A-29). The District Court found, with respect to the second part of the test, that the facts establishing the effectiveness of the checkpoint, i.e., whether the checkpoint reasonably advanced its stated goals, were incomplete and in dispute, notwithstanding that there were no drive-by shootings, the primary target of the operation, while it was in effect, and ruled that only after a fuller presentation of the evidence at trial, could the Court apply the test and determine whether the checkpoint passed constitutional muster (App. A-29). Accordingly, the Court denied petitioner's and the municipal defendants' motions for summary judgment on petitioner's Ninth Claim for the alleged Fourth Amendment violation (App. A-29-30).

In denying respondents' claim that they are "entitled to qualified immunity for their alleged violation of petitioner's right to be free from unconstitutional seizures," the District Court, quoting case law from this Court and the Court of Appeals for the Second Circuit, acknowledged that "Public officials are entitled to qualified immunity from liability for civil damages if their 'conduct does not violate clearly established statutory or constitutional rights of which a

reasonable person would have known'" (App. A-32-33). The Court, however, applied the following analysis (App. A-33):

> As a threshold matter, a court must determine whether the alleged conduct violated any constitutional right. ... Because one of [petitioner's] constitutional claims must proceed to trial, it cannot be determined at this stage whether [petitioner] suffered any violation of his constitutional rights. Further, if [petitioner's] version of the facts proves true, and the officers did not provide adequate instructions on how to operate the checkpoints,[6] qualified immunity would not

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[6] According to petitioner's version of the facts as set forth in his Memorandum of Law submitted in support of his cross-motion for partial summary judgment (A 959-976) and Rule 3(g) statement (A 1025-1038), all motorists seeking access to the barricaded area would encounter a manned police barricade (A 963-964, 1028). The documents describing the operation provided that "[a]rea residents and commercial vehicles will be allowed to enter the target area...;" "[t]hose individuals who do not appear to have a legitimate reason to enter will be instructed to utilize other routes. Vehicular traffic only" (A 964-965, 1028-1029). According to petitioner, the deposition testimonies of Lieutenant Kelly, Chief Gallagher, Officer Morley, and Sergeants Gonin and Van Leuven show that whether the motorist provided a legitimate reason to enter was a subjective determination to be made by the officers manning the barricade based on the individual officer's judgment and discretion depending on the circumstances presented (A 965-976, 1029-1038).

protect them. Therefore, ... the issue of qualified immunity also must proceed to trial.

(b)

The Opinion of the Court of Appeals

The Court of Appeals for the Second Circuit, in a two-to-one decision, reversed the denial of qualified immunity, holding that "establishing the particular vehicle checkpoint without more did not violate [petitioner's] Fourth Amendment rights ..." (App. A-3). The majority, finding that a Fourth Amendment seizure occurs when a vehicle is stopped at a checkpoint, applied the three-pronged test set forth in Brown v. Texas, 443 U.S. 47, 50-51 (1979) and applied in Michigan Department of State Police v. Sitz, 496 U.S. 444, 448-49 (1990) ("Sitz"), in assessing the reasonableness of the seizure (App. A-6-7). This included balancing "(i) the gravity of the public concerns served by the checkpoint; (ii) the degree to which the checkpoint effectively addresses those concerns; and (iii) the severity of the intrusion upon individual liberty" (App. A-7). Under this analysis, the Court of Appeals determined first, that the checkpoints "served an important public concern in attempting to deter drive-by shootings that were, or were reasonably perceived to have been, connected with widespread drive-up drug purchases" (App. A-7). As for the second prong, the majority found that "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter criminal behavior in the barricaded area," noting that "checkpoints similar to the one here had been effectively used in the past by the New York City Police," and adding that "in order to satisfy the effectiveness prong, a checkpoint need only be one reasonable method of deterring

the prohibited conduct; it need not be the most effective method," citing Sitz, 496 U.S. at 453-54 (App. A-7).

As to the third prong, the majority, in reliance on United States v. Martinez-Fuerte, 428 U.S. 543 (1976) ("Martinez-Fuerte") and Sitz, supra, 496 U.S. 444, found that "the intended level of intrusion to motorists was minimal," noting that "[n]o vehicle was to be stopped or its operation questioned unless entry into the cordoned-off area was desired;" that "[f]or those seeking entry, the stop was meant to be brief and was aimed solely at ascertaining the motorists' connection to the neighborhood;" and that "because the plan here was to stop all motorists seeking entry, there was little concern that the stop would generate 'fear and surprise'" (App. A-7-8).

As to petitioner's argument that the plan empowered the officers with excessive discretion to turn people away, the Court of Appeals noted that "the instructions given allowed all residents and commercial vehicles to enter, as well as persons dropping off little children or visiting the church. It is true that discretion was to govern the inevitable myriad of other circumstances that might arise, but we know of no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them. We believe that the instructions were as detailed as was reasonably possible and, therefore, were constitutionally adequate" (App. A-8-9).

In a dissenting opinion, Senior Circuit Judge Oakes agreed with the District Court that only after trial could a factual determination regarding the checkpoint's effectiveness be made and the second prong of the Brown test correctly applied, and that not until the threshold question of whether a seizure actually took place is resolved, would it be possible to

determine whether the checkpoint could pass constitutional muster (App. A-10-14). Judge Oakes agreed with petitioner's contention that entrance to the barricaded area was "left to the arbitrary determination of officers in the field with no meaningful written standards of how to exercise their discretion;" and found that "it is this unfettered discretion that makes the majority's resolution of the case, ..., totally unsound" (App. A-14-15). Judge Oakes concluded, "the decision ... goes a long way toward putting the stamp of judicial approval on overly-discretionary police practices. Unfortunately, it does so unnecessarily because here the factual record was, in a very capable district judge's view, insufficiently developed to permit coming to sound conclusions in several respects" (App. A-16).

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court of Appeals properly granted summary judgment to respondents on the basis of qualified immunity. The Special Operation passed constitutional muster under the three-pronged analysis set forth by this Court in Brown v. Texas, 443 U.S. 47 (1979) and found applicable to checkpoints in Michigan Department of State Police v. Sitz, 496 U.S. 444 (1990).

(a)

Petitioner has not presented a compelling question to be reviewed by this Court. The Court of Appeals correctly applied the three-pronged test articulated in Brown v. Texas, 443 U.S. 47, and employed in Sitz, 496

U.S. 444, in assessing the reasonableness of the checkpoint in issue. In Brown, this Court held that consideration of the reasonableness of a seizure that is less intrusive than an arrest, "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." 443 U.S. at 50-51. Petitioner seeks to overturn the decision of the Court of Appeals by arguing that the relevant authorities in assessing the reasonableness of the suspicionless stop here at issue are Chandler v. Miller, __ U.S. __, 117 S. Ct. 1295 (1997); Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989); Veronia School District 47J v. Acton, __ U.S.__, 115 S. Ct. 2386 (1995); and National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), which require the demonstration of "special needs 'beyond the normal need for law enforcement'" to permit suspicionless searches and seizures (See Petition For Writ Of Certiorari ("Pet."), 14).[7] Petitioner seeks to eschew the balancing test used in Sitz, and asserts that this Court upheld the constitutionality of the stops at issue in Martinez-Fuerte and Sitz "based upon the presence of 'special needs' coupled with the existence of neutral, objective standards which ensured that the searches and seizures would be minimally intrusive" (Pet., 14). However, in Sitz, 496 U.S. at 449-50, this Court specifically rejected this "special needs" analysis and found that from a reading of the decision in National Treasury Employees Union v. Von Raab, "which cited and discussed

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[7] None of these cases involved a checkpoint at which all motorists were stopped. Rather, these cases involved the constitutionality of suspicionless searches incident to drug testing.

with approval [the Court's] earlier decision in United States v. Martinez-Fuerte, 428 U.S. 543 ...(1976), that it was in no way designed to repudiate [the Court's] prior cases dealing with police stops of motorists on public highways. Martinez-Fuerte, ... which utilized a balancing analysis in approving highway checkpoints for detecting illegal aliens, and Brown v. Texas, ..., are the relevant authorities here." Indeed, this Court recently, in Chandler v. Miller, supra, __ U.S. at __, 117 S. Ct. at 1298, again cited these earlier decisions with approval.

(b)

When properly viewed under the analysis used by this Court and followed by the Court of Appeals, there is simply no merit to petitioner's assertion that the checkpoint here at issue was unconstitutional in its creation. With respect to the first prong, the Court of Appeals, having found that the Special Operation was instituted in response to a wave of street crime, including four drive-by shootings during the spring and summer of 1992, found that the checkpoints "served an important public concern in attempting to deter drive-by shootings that were, or were reasonably perceived to have been, connected with widespread drive-up drug purchases" (App. A-3, 7). It cannot be seriously disputed that the public interest in curtailing this wave of violence is equally as weighty as the interest involved in Sitz, 496 U.S. at 451, detecting drunk drivers, and in Martinez-Fuerte, 428 U.S. at 552, 556-57, detecting illegal aliens.

As for the second prong, the majority found that "at the time of implementation, the checkpoints were reasonably viewed as an effective mechanism to deter

criminal behavior in the barricaded area," noting that "checkpoints similar to the one here had been effectively used in the past by the New York City Police," and adding that "in order to satisfy the effectiveness prong, a checkpoint need only be one reasonable method of deterring the prohibited conduct; it need not be the most effective method," citing Sitz, 496 U.S. at 453-54 (App. A-7).

The Court of Appeals correctly rejected the District Court's finding that the "effectiveness" of the checkpoint required the presentation of more evidence (App. A-29). The analysis of effectiveness does not properly involve a "searching examination" of effectiveness. Sitz, 496 U.S. at 454. As noted by the District Court, "the stated primary purpose of the operation was to 'prevent drive by shootings'" (App. A-21), and concededly, "no drive-by shootings occurred during the [Special] Operation" (App. A-29). This statistic alone establishes that the Special Operation was more successful than the sobriety checkpoint at issue in Sitz, in which only 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment. 496 U.S. at 454-55. Indeed, in Martinez-Fuerte, 428 U.S. 543, this Court sustained the constitutionality of two permanent immigration checkpoints (one near San Clemente, California and one near Sarita, Texas), even though no statistical information regarding the Sarita checkpoint was provided and, with respect to the checkpoint at San Clemente, the ratio of illegal aliens detected to vehicles stopped was approximately 0.5 percent (see Sitz, 496 U.S. at 455).

As to the third prong, the majority, in reliance on Martinez-Fuerte and Sitz, found that "the intended level of

intrusion to motorists was minimal," noting that "[n]o vehicle was to be stopped or its operation questioned unless entry into the cordoned-off area was desired;" that "[f]or those seeking entry, the stop was meant to be brief and was aimed solely at ascertaining the motorists' connection to the neighborhood;" and that "because the plan here was to stop all motorists seeking entry, there was little concern that the stop would generate 'fear and surprise'" (App. A-7-8). Indeed, drivers who wished to avoid the police questioning could drive around the barricaded area or park their cars outside the barriers and enter on foot (App. A-21; A 121-122). The temporary checkpoint allowed all pedestrians to proceed into the area (App. A-21; A 121-122).[8] "No officers had discretion to search vehicles or 'to conduct actual, physical searches of persons or automobiles if they suspected drugs or guns were present'" (App. A-23; A 121). "Their task was limited to 'determine whether passing cars belonged to neighborhood residents and if not

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[8] To the extent petitioner suggests that the Court of Appeals' decision eviscerates rights to freely travel public roads "to visit friends, loved ones, or merchants, or just to pass through" (Pet., 20), the District Court determined that the checkpoint did not infringe directly on any purported right to intrastate travel (App. A-30-31); nor on his First Amendment right of freedom of association since the temporary checkpoint allowed all pedestrians to proceed into the area and permitted all drivers who lived in the neighborhood to proceed (App. A-31-32). Petitioner never sought permission to appeal from these rulings and cannot now reassert such claims.

to turn [them] away'" (App. A-23; A 121).[9] The stops lasted no longer than a few minutes, and the checkpoint caused no significant traffic congestion (App. A-23, A 122). The greatest inconvenience that could have been caused by the roadblock was that due to taking a detour of several blocks or parking one's car a couple of blocks from one's destination (A 122). As such, the objective intrusiveness to individual occupants was minimal; all that was required of a motorist was a response to brief questioning and the production of one's license or a document evidencing a relationship to the community (A-21).

Furthermore, the subjective intrusiveness -- the generating of fear or surprise on the part of travellers -- of a checkpoint is significantly ameliorated because the motorist can see that all motorists are being stopped and can see visible signs of the officers' authority. Sitz, 496 U.S. at 452-53. Here, the checkpoint was "'clearly visible'" and "drivers in the area could 'readily observ[e] that all cars were uniformly stopped'" (App. A-23; A 122-123).

As to petitioner's argument that the plan empowered the officers with excessive discretion to turn people away, the Court of Appeals noted that "the instructions given allowed all residents and commercial vehicles to enter, as well as persons dropping off little

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[9] Since the plan only allowed for the turning away of a vehicle when no legitimate reason for entry into the area was given, the Court of Appeals properly found that this "turning away" may not constitute a search or seizure for Fourth Amendment purposes (App. A-9, n. 2).

children or visiting the church. It is true that discretion was to govern the inevitable myriad of other circumstances that might arise, but we know of no way to catalogue each of those circumstances in advance and to provide a litmus test to resolve them. We believe that the instructions were as detailed as was reasonably possible and, therefore, were constitutionally adequate" (App. A-8-9).

It is undisputed that a central concern in assessing the reasonableness of seizures that are less intrusive than an arrest is to assure that an individual's reasonable expectation of privacy not be subjected "to arbitrary invasions solely at the unfettered discretion of officers in the field." Brown v. Texas, supra, 443 U.S. at 51; Delaware v. Prouse, 440 U.S. 648, 654-55 (1979).

There is nothing in any of the relevant case law to suggest that an officer loses the basic discretion to use the training, experience and judgment as a police officer simply because he or she is manning a checkpoint stop and making inquiries within the operational confines of the checkpoint, including the ability to evaluate the veracity of those one encounters and, based on the response obtained, to turn certain people away. Without such discretion the Special Operation could have had absolutely no utility whatsoever.

This Court has clearly stated that the abuse of discretion with which it is concerned is the power to stop randomly selected vehicles in a non-uniform, standardless manner subject only to the discretion of the individual officer. In Delaware v. Prouse, supra, 440 U.S. 648, it was the randomness of the stop at issue that made it constitutionally infirm and not the inquiries made by the

officer once the stop was made. In Prouse, the Court never raised any questions concerning the "discretion" involved in asking to see a driver's license and registration. In fact, the Court took it for granted that such inquiries were legitimate if conducted in a uniform manner in which the selection of those questioned was not left to the discretion of officers in the field, 440 U.S. at 663:

> This holding does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion.... Questioning of all oncoming traffic at roadblock-type stops is one possible alternative.

Implicitly, since the inquiry at issue was the request to see a driver's license and registration, Prouse would appear to permit such questioning if conducted in a uniform manner not involving unfettered discretion in the selection of whom the police will question. As such, the Special Operation, in which all persons passing the roadblock were uniformly asked for the same information relevant solely to the legitimate operation of the checkpoint, did not involve any abuse of discretion.

In United States v. Martinez-Fuerte, 514 F.2d 308 (9th Cir. 1975), rev'd, 428 U.S. 543 (1976), the Ninth Circuit had ruled that an immigration checkpoint operation under a warrant of inspection, involving the slowing down or stopping of all vehicles, and utilizing the "purely discretionary" opinion of a border patrol agent as to which cars should be dispatched to a secondary inspection area

where its occupants would be asked questions which were "personal in nature," i.e., about their citizenship and immigration status, was impermissible under the Fourth Amendment. 514 F.2d at 313, 320. In reversing, the Court rejected the challenge to the checkpoint agents' discretion in making "selective referrals" to the secondary area, noting that the border patrol agents "must have wide discretion in selecting the motorists to be diverted for the brief questioning involved." Martinez-Fuerte, 428 U.S. at 563-64.

Similarly, the post-stop discretion exercised by the officers conducting the checkpoint, the constitutionality of which was upheld, in Sitz, was at least as broad-ranging as the discretion exercised by the officers manning the Special Operation. At the sobriety checkpoint at issue in Sitz, all vehicles passing through the checkpoint were stopped and drivers were examined for signs of intoxication. 496 U.S. at 447. If a checkpoint officer detected any signs of intoxication, the motorist was directed out of the flow of traffic to a secondary questioning area where officers would check the motorist's license and car registration and, if warranted, conduct further sobriety tests. Id. The discretion involved in observing, questioning and sniffing a motorist and determining whether he or she is intoxicated is at least as broad-ranging as that required to ask for a motorist's driver's license or identification and to determine that motorist's relation to the community. The request for a driver's license or some other indicia of residence in a specific neighborhood is easily standardized and depends much less on the highly subjective observation of physical appearances than does the determination that a motorist appears to be intoxicated. The discretion necessary to ascertain whether someone has a legitimate reason to be in

a particular neighborhood cannot reasonably be said to reach the level of being an arbitrary or unfettered use of discretion, as petitioner wrongly contends.

Finally, when considering the possible constitutional implications of the discretion available to the officers manning the Special Operation, it is helpful to take into account the relatively unintrusive character of the Special Operation as distinguished from other checkpoint operations which have been found to be constitutional. Sobriety and immigration checkpoints are intended both to deter and to detect criminal activities. The Special Operation was not instituted in order to detect criminals in a dragnet operation; it was simply intended to deter drive-by shootings and to protect the public safety in the community. An officer utilizing his or her proper discretion at a sobriety checkpoint has the ability to bring the full power of the state to bear upon a person who, in his or her determination, is driving while impaired. At the very least an officer at a sobriety checkpoint retains the discretion to subject a motorist to substantial further questioning, a possible breathalyzer test, and the risk of criminal prosecution. An officer manning an immigration checkpoint retains the discretion to refer a person to a secondary questioning area in which inquiries concerning one's citizenship status can be made and a motorist might face the risk of possible criminal prosecution or banishment from the United States. Officers manning the checkpoints in connection with the Special Operation were not there for the purpose of bringing criminal or civil sanctions against the motorists they encountered -- they were granted the discretion only to determine a motorist's relation to the community and to turn away any vehicle when no legitimate reason for entry into the area was given. As

such, the discretion vested in officers manning the Special Operation allowed little potential for abuse and is consistent with that previously upheld by this Court.

In sum, respondents submit that the balance of their interest in reducing drug activity, street robberies, and most importantly eliminating drive-by shootings in the targeted area, the reasonable belief that the checkpoint would deter criminal behavior and the achievement of its primary goal of deterring drive-by shootings, and the minimal degree of intrusion upon motorists briefly stopped at manned police barricades for purposes of responding to routine questions concerning one's connection to the neighborhood, weighed in favor of the temporary operation, and was properly found to be consistent with the Fourth Amendment.

(d)

Petitioner, consequent to his argument that the Special Operation was violative of the Fourth Amendment, asks this Court to rule that the Special Operation violated "clearly established" rights at the time when it was established for purposes of vitiating respondents' qualified immunity, rather than to remand the issue back to the Court of Appeals (Pet., 23). Even assuming, arguendo, that the Special Operation was found to be unconstitutional, as planned, the preexisting law in 1992 could not possibly have led Lieutenant Kelly, Inspector Lee and Chief Gallagher, or any other reasonable police official, to conclude while establishing the Special Operation that it was unlawful. Indeed, Supreme Court, Second Circuit and New York State Court of Appeals case law in 1992 supported the constitutionality of the Special Operation, as

they do today. At most, the individual respondents operated in an area where the law "was not charted clearly." Security and Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187, 211 (2d Cir. 1984). Where the law is unclear, qualified immunity applies. See Prue v. City of Syracuse, 26 F.3d 14, 19 (2d Cir. 1994); Ying Jing Gan v. The City of New York, 996 F.2d 522, 532 (2d Cir. 1993); Molinelli v. Tucker, 901 F.2d 13, 16-17 (2d Cir. 1990). See also Wilkinson v. Forst, 832 F.2d 1330, 1341-42 (2d Cir. 1987), cert. denied, 485 U.S. 1034 (1988) (defendant commissioners were not individually liable for violating rights of Ku Klux Klan members who had been subjected to mass pat-down searches at checkpoints before entering Klan rally sites; Court found "law applicable to the unique and difficult problem presented to the defendants by these historically unprecedented Klan rallies in Connecticut [was not] so adequately clear and settled as to warrant an award of damages ..."); Shankle v. Texas City, 885 F. Supp. 996, 1006 (S.D. Texas 1995) (although the random erection and enforcement of roadblocks at the entrances to a neighborhood, ostensibly created for purposes of reducing gang-related criminal activity in the area, were held to be unconstitutional, the Court found that because "the law was not clearly established as to the Constitutionality of the type of roadblocks" erected at the time of their occurrence in the summer of 1994, the Mayor and Chief of Police were immune from suit).

To defeat an official's claim of qualified immunity, petitioner must demonstrate that the right he is asserting was clearly established at the time of the alleged violation. See Hunter v. Bryant, 502 U.S. 224, 233 (1991) (Stevens, J., dissenting); Whalen v. County of Fulton, 19 F.3d 828,

831 (2d Cir. 1994) (Walker, J., dissenting), cert. denied, 513 U.S. 1076 (1995); Ying Jing Gan v. The City of New York, supra, 996 F.2d at 534; Francis v. Coughlin, 891 F.2d 43, 46 (2d Cir. 1989); Musso v. Hourigan, 836 F.2d 736, 742 (2d Cir. 1988). As neither petitioner nor the District Court cited any case holding checkpoints of this nature to be unconstitutional, nor pointed to any cases which would have made it apparent that such an operation would be unlawful,[10] there is no merit to petitioner's contention that the existing case law put respondents on notice that the Special Operation violated the Fourth Amendment.

(e)

In this petition, petitioner asserts that the decision of the Court of Appeals should be reversed. Petitioner repudiates the District Court's finding that a further statistical analysis of whether the Special Operation reduced crime is necessary in determining the effectiveness prong of the Brown analysis (Pet., 18, n. 5). Therefore,

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[10] As the Court of Appeals for the Second Circuit has noted, "[w]hen addressing a claim of qualified immunity, a court must take care not to pose the issue in terms that are too general or abstract." Mozzochi v. Borden, 959 F.2d 1174, 1177 (2d Cir. 1992). "[T]he right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987). Where reasonably competent officials could disagree, immunity should be recognized. Malley v. Briggs, 475 U.S. 335, 341 (1986).

petitioner, who did not seek permission to appeal from the District Court's order and sought affirmance of that Order in his appellee's brief in the Court of Appeals, is asking this Court to grant certiorari so that he can be afforded relief which was not granted to him by either the District Court or even propounded in the dissenting opinion by Judge Oakes. Petitioner should not be given such an opportunity.

(f)

For all the above reasons, this case does not present important issues meriting review by this Court. This Court's decisions in Sitz and Martinez-Fuerte, and the three-pronged analysis of Brown v. Texas found applicable to checkpoint operations, govern the checkpoint at issue and provide ample support for the reasonableness of the Special Operation. Petitioner's contention that the checkpoints were unconstitutional is premised upon a flawed application of the appropriate balancing test. Petitioner's attempt to infuse the three-part analysis with a "special needs" component has already been soundly rejected by this Court.

Petitioner's suggestion that this case presents the Court "with an important and timely opportunity to clarify the broader question of whether blanket suspicionless vehicular stops are permissible under the Fourth Amendment for purposes of crime prevention" (Pet., 25), misapprehends the limited nature of the Special Operation. The Special Operation was instituted to serve the weighty concerns of disrupting a local drug market and putting an end to a rash of drive-by shootings in the community. It was a response that was closely tailored to address a specific situation which had spun out of control, bringing

an intolerable condition of random violence to bear upon the community. The closing of the Watson Avenue target area to non-local vehicular traffic was a logical plan to disrupt the neighborhood's drive-through drug market and prevent drive-by shootings, as one cannot commit a drive-by shooting while on foot. Petitioner's comparison to other checkpoint operations which were found wanting under the Brown analysis does not negate the lucidity of the guiding principles enunciated in Martinez-Fuerte and Sitz.

CONCLUSION

FOR ALL THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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